



STAFF REPORT

Regular Agenda

To: Gallatin County / Bozeman Area Board of Adjustment

From: Amy Waring, Code Compliance Specialist

Subject: The Hanger LLC / Filmlites Montana LLC Appeal

Hearing Date: January 15, 2008

Location: Gallatin County Courthouse – Community Room
311 W. Main, Bozeman, MT

COMPLAINT

1. On March 31, 2006, the Fort Ellis Home Owners Association filed a complaint with Gallatin County that The Hanger LLC is leasing the property at 620 Canary Lane, Bozeman, MT to Filmlites Montana LLC for an illegal commercial use. Both the Conditional Use Permit (CUP) and Planned Unit Development (PUD) for the Fort Ellis Community subdivision designate this property and associated building for recreational use. The property is not zoned for commercial use.

COMPLIANCE FINDINGS

2. 620 Canary Lane is a 3.72-acre parcel described as the "Recreation Area" on the final plat for the Fort Ellis Leisure Community Phase 1-A Subdivision located in the SE 1/4 of Section 16, Township 2 South, Range 6 East P.M.M., Gallatin County, Montana.
3. The property is owned by Lands of the Hanger LLC (David Richards) and leased to Filmlites Montana LLC for commercial use. Prior to ownership by Lands of the Hanger, the property was owned by Planned Development Inc. and Fort Ellis Leisure Community Inc. (both David Richards).
4. The parcel is located in the R-S Zone of the Gallatin County / Bozeman Area (GC/BA) Zoning District. The intent of the R-S Zone is to allow Planed Unit Developments (PUD's) and single-household developments on lots of one acre.
5. Pursuant to Section 12.020B of the GC/BA Zoning Regulation ("Regulation"), PUD's and a limited number of commercial uses are allowed in the R-S Zone with a Conditional Use Permit (CUP).

6. On **July 25, 1994**, the Bozeman City Commission approved a **Conditional Use Permit (CUP)** for the Fort Ellis Subdivision Planned Unit Development (PUD). As part of that approval, the property described as 620 Canary Lane was designated a “Recreation Area” for residents of the Fort Ellis Subdivision. An existing agricultural building was supposed to be converted to a recreation building. **(Exhibit 1)**
7. On **July/August 26, 1994**, the Gallatin County Commission approved the **Preliminary Plat** for the Fort Ellis Leisure Community Planned Unit Development Subdivision, Phase 1. The preliminary plat designated the subject property as a private recreation area. **(Exhibit 2)**
8. On **December 15, 1995**, the City of Bozeman Planning Director approved the **final site plan** for the Fort Ellis Subdivision, which designated 620 Canary Lane as a “Recreation Area.” **(Exhibit 3)**
9. On **January 2, 1996**, the Gallatin County Commission approved the **final plat** for the Fort Ellis Leisure Community Phase 1-A Planned Unit Development. **(Exhibit 4)**
10. Every document contained in the City of Bozeman’s file on the Fort Ellis Leisure Community Subdivision (CUP, PUD, Site plan, covenants, correspondence, etc) indicates that the subject property was designated as the “Recreation Area” for residents of the subdivision.
11. On **June 21, 1999**, Debbie Arkell (City of Bozeman) sent a memorandum to Nadia Beiser (representing Planned Development Inc.). This memorandum states:

“The second inquiry was with regard to the 3.73 acre recreational lot which was created around an existing agricultural building...As the recreational lot was a major focus of the PUD, this is also considered a major modification that will require full review and public hearings. Depending on what will occur on this lot, an amendment the subdivision will likely also be necessary, as the lot is stipulated for recreation use.” **(Exhibit 5)**
12. The Hanger LLC (Dave Richards) provided minutes from a January 10, 1999 Fort Ellis Community Owners Association Meeting. The minutes reflect that the lot owners discussed the future of the recreational building, and decided to send out a ballot for a vote on whether the association should own, maintain or use the recreational area. The result was that 27 of 28 lot owners approved an amendment to the subdivision’s **covenants** to abandon the original concept of the Homeowner’s Association using, owning, or controlling and maintaining a recreational building and associated recreated recreational uses. **(See Numbers 9, 10, and 11 of Exhibit 10)**
13. On October 25, 1999, David Richards sent a letter to the Gallatin County Clerk and Recorder discussing the recording of revised covenants for Fort Ellis Community, Phase 1-A to abandon the recreational building. The letter states, “Assistant Attorney Susan

Swimley has reviewed these actions, and has advised me that the proper procedures were followed to revise the covenants.” The letter does not discuss amending the PUD or CUP. **(See Number 12 of Exhibit 10)**

14. On October 26, 1999, Planned Development Inc. filed revised covenants for Fort Ellis Leisure Community Phase 1-A (Document No. 200178). The revised covenants are dated June 1999, and remove the recreational area from the definition of common area. **(See Number 13 of Exhibit 10)**
15. On November 22, 2004 Mr. Richards filed COS No. J-221-B, which is a Retracement Survey. The survey replaced the words “Recreation Area” with “Lands of the Hanger” on the 3.72-acre parcel. **(Exhibit 6)**

DECISION

16. In response to the complaint filed with Gallatin County on March 31, 2006, I conducted an initial review of public records regarding the current ownership, use, and approvals granted for the property at 620 Canary Lane, Bozeman, MT.

On **August 29, 2006**, I determined that commercial use of the property is not allowed, and ordered The Hanger LLC and Filmlites Montana LLC to cease and desist all commercial operations at 620 Canary Lane within 60 days of their receipt of my letter **(Exhibit 7)**.
17. On September 29, 2006, The Hanger LLC and Filmlites Montana LLC appealed my August 29, 2006 determination and cease and desist order, alleging among other things that the commercial use of the property is a prior con-conforming use **(Exhibit 8)**. On October 25, 2006, I met with the appellants to discuss their appeal.
18. On October 25, 2006, I withdrew my August 29, 2006 decision and cease and desist order for The Hanger LLC and Filmlites Montana LLC pending the submittal of sufficient evidence to make a nonconforming use determination **(Exhibit 9)**.
19. On December 13, 2006, the appellants submitted additional information **(Exhibit 10)**. I reviewed this information, as well as the complete project file on the Fort Ellis Leisure Community for PUD and CUP approval, and the GC/BA Zoning Regulation. During this review process, I determined that the issue was not that of a nonconforming use determination; rather it was a process issue for amending a CUP and PUD.
20. On **February 22, 2007**, I determined that the Hanger LLC and Filmlites Montana LLC are operating a commercial use from 620 Canary Lane in violation of Sections 12.020(B) and 54.050(D)(4) of the GC/BA Zoning Regulation because the PUD and CUP were not amended to change the use from a “Recreation Area” to a commercial use. **(Exhibit 11)**

21. On March 12, 2007, the appellants suggested any action by Gallatin County is barred by a statute of limitations, but did not formally appeal my February 22, 2007 decision.
22. Subsequent conversations/meetings with both the appellants and complainant resulted in a time delay while the Fort Ellis Homeowners Association met to discuss whether they wanted to move forward their complaint against The Hanger LLC and Filmlites Montana LLC. On April 23, 2007, the complainant notified me that the homeowners association wanted to move forward with their zoning complaint. However, the appeal deadline to my February 22, 2007 decision lapsed.
23. On May 17, 2007, I affirmed my February 22, 2007 decision in order to allow the opportunity to appeal. I again found that The Hanger LLC and Filmlites Montana LLC are operating a commercial use from 620 Canary Lane in violation of Sections 12.020(B) and 54.050(D)(4) of the GC/BA Zoning Regulation because the PUD and CUP were not amended to change the use from a “Recreation Area” to a commercial use. (**Exhibit 12**)

Rationale for Decision

The Hanger LLC / Filmlites Montana LLC are operating a commercial business from 620 Canary Lane. The Conditional Use Permit, Planned Unit Development (subdivision approval), original final plat, and final site plan designate this tract as a “Recreation Area.”

Pursuant to Section 12.020B, uses approved as part of a PUD are a *Conditional Use* in the R-S District. A Conditional Use Permit is binding upon the owner of the land, his successors or assigns (Section 53.030(B) – CUP Procedures).

Pursuant to Section 54.050(D)(4) (PUD Procedures), a major change to a Planned Unit Development shall be approved only by the *County Commission*, and must follow the same planned unit development review and public hearing process required for approval of preliminary plans.

On June 21, 1999, Debbie Arkell (City of Bozeman) advised Nadia Beiser (representing Planned Development, Inc.) that the recreational lot was a major focus of the PUD, and that a major modification requires full review and public hearings. Ms. Arkell advised Ms. Beiser that amendment to the subdivision may be likely, as the lot is stipulated for recreation use. Thus, in 1999, Planned Development Inc., the current appellant’s predecessor was put on notice that additional review was required to make changes to the recreational lot.

Pursuant to Section 54.050(D)(4)(b)(ii), major changes to a PUD that require County Commission approval include a change in the character of the development. Similar to Ms. Arkell’s decision in 1999, I determined that a change from Recreation Use to private, commercial use constitutes a change in character of the development, and is a major modification to the subdivision.

Therefore, the Hanger LLC / Filmlites Montana LLC are operating a commercial business from 620 Canary Lane in violation of the CUP and PUD procedure provisions of the GC/BA Zoning Regulation. The CUP and PUD are binding, and any use approved through these processes cannot be changed without the consent of the County Commission.

A homeowners vote to change the subdivision's covenants, and subsequent filing of the amended covenants and a retracement survey does not comply with established procedures in the GC/BA Zoning Regulation to amend a CUP or a PUD.

APPEAL

24. On July 2, 2007, The Hanger, LLC and Filmlites Montana LLC submitted an appeal of my May 17, 2007 decision (**Exhibit 13**). The appeal was timely. The July 2, 2007 appeal stated that the parties were currently negotiating a resolution, and that any zoning issues would be moot if the two parties come to an agreement.
25. In the absence of an agreement between the two parties, on October 30, 2007, the appellants supplemented their July 2, 2007 appeal and an appeal hearing before the BOA was scheduled. (**Exhibit 14**)
26. Appellants argue that assertions by Gallatin County and the Homeowners Association are invalid and barred by the concepts of Laches / Statute of Limitations based on the following (with my response to those arguments):

A & B. Homeowner Meeting and Homeowner Vote / Amended Covenants

Gallatin County does not contest the fact that covenants were changed. However, Planned Development Inc. was put on notice in 1999 that review and public hearings were required to amend the PUD/CUP, and this process was never completed. Amending covenants does not comply with procedures to amend the CUP/PUD.

C. Improvement Agreement

Gallatin County does not contest that the developer entered into an improvements agreement. However, the County asserts that this fact is irrelevant to the decision at hand as it is not enforcing any contractual right in this matter and therefore any statute of limitations argument is irrelevant.

D. Filing of Certificate of Survey J-221-B

It is true that a Retracement Survey was filed at the Gallatin County Clerk and Recorder's Office. However, that office is not responsible for enforcement of the Gallatin County / Bozeman Area Zoning Regulation.

Planned Development Inc. was put on notice in 1999 that review and public hearings were required to amend the PUD/CUP, and this process was never completed. Filing a Retracement Survey is not the legal zoning process for converting the use to commercial.

Gallatin County maintains that the Hanger LLC and Filmlites Montana LLC must amend the PUD and CUP to legally change the use from recreation to commercial.

E. Use of the property for Commercial Purposes

Gallatin County is unaware of any facts to the contrary. However, the County asserts that this argument is irrelevant to the decision at hand.

F. Laches

Any use approved in the CUP and PUD is binding upon the owner of the land, his successors or assigns. It cannot be changed without consent of the County Commission, and a violation of the terms of the CUP/PUD may be enforced at any time.

Montana courts do not generally accept the use of equitable defenses such as Laches against a government agency. *See, Stewart v. Ravalli County*, 2002 MT 1420. Such an argument is beyond the scope of an appeal to the Board of Adjustments pursuant to Section 56.010 of the Regulation.

27. Appellants argue that any action that the County is suggesting is barred by Equitable Estoppel.

Montana courts do not generally accept the use of equitable defenses such as Equitable Estoppel against a government agency. *See, Stewart v. Ravalli County*, 2002 MT 1420. Such an argument is beyond the scope of an appeal to the Board of Adjustments pursuant to Section 56.010 of the Regulation.

STAFF SUGGESTED ACTION

The BOA must make findings to affirm, modify or reverse the February 22, 2007 and May 17, 2007 decisions by the Code Compliance Specialist.

I would like the BOA to affirm my decision because any use approved as part of a CUP/PUD is binding upon the owner of the land, his successors or assigns. Conversion of a use from recreation to private, commercial use without amending the CUP and PUD constitutes an illegal use of the property.